IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. ~~[illegible]~~ 112

JAMES H. GRAY, as Chairman of the Georgia State Democratic Executive Committee;
GEORGE D. STEWART, as Secretary of the Georgia State Democratic Executive Committee;
THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE;
THE GEORGIA STATE DEMOCRATIC PARTY, and
BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellants,

vs.

JAMES O'HEAR SANDERS,
Appellee.

Appeal from United States District Court for the Northern District of Georgia, Atlanta Division.

MOTION TO AFFIRM.

HERMAN HEYMAN,
MORRIS B. ABRAM,
ROBERT E. HICKS,
Attorneys for Appellee.

1504 Healey Building,
Atlanta 3, Georgia.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

Cases Cited.

Constitutions Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. .....

JAMES H. GRAY, as Chairman of the Georgia State Democratic Executive Committee;
GEORGE D. STEWART, as Secretary of the Georgia State Democratic Executive Committee;
THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE;
THE GEORGIA STATE DEMOCRATIC PARTY, and
BEN W. FORTSON, JR., as Secretary of State of the State of Georgia,
Appellants,

vs.

JAMES O'HEAR SANDERS,
Appellee.

Appeal from United States District Court for the Northern District of Georgia, Atlanta Division.

MOTION TO AFFIRM.

Appellee in the above-entitled case moves to affirm under Rule 16 (c) on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED.

The questions presented by Appellee may be subsumed under those stated by Appellants. However, the statement herein will serve to refine the issues consistently with the record as the same is understood by Appellee.

Appellee assumes from Appellants' Statement of Jurisdiction that since **Baker v. Carr** they do not question the jurisdiction of the court nor the justiciability of the issues presented.

Appellee contends that these have been the only substantial questions presented in any county suit litigation. Subsidiary questions remaining since **Baker v. Carr**, such as the application of the Equal Protection Clause and the Seventeenth Amendment to the Georgia County Unit Statute pose issues for which conventional standards are well established.[1]

---

[1] The panel court by invalidating the county unit statute under the Fourteenth Amendment avoided any necessity of ruling under the Seventeenth Amendment. As will be mentioned later, the application of the Seventeenth Amendment is a moot question if the primary, as is expected, is conducted by popular vote.

STATEMENT.

The panel court invalidated a county unit statute which succeeded the Act of 1917 attacked in the original complaint. Under this new county unit statute, a majority of the Georgia population of voting age (50.4%) had only 31.1% of the total units assigned to the whole state.[2] Under it, in a two-man race for statewide office, 15.4% of the State's population of voting age could elect any state house officer or a United States Senator; in a three-man race, 10.2% would suffice; in a five-man race, only 6.1% would be required. Combination of units from counties having the smallest population would give those with one-third of the total population of the State a clear majority of the county units.

Unit increment brackets under this new law were contrived so as to deprive no small county of any units accorded under the previous Act. Under the new Act, counties from 0-15,000 people received two units; then there was an increment of one unit for the next 4,999 persons; then an increment of one unit for 9,999 persons; then an increment of one unit for 14,999 persons; then an increment

---

[2] At footnote 10 on page 15 of the Appellants' Statement of Jurisdiction, they compare the discrimination of the 1962 Amendment to that under the 1917 law when enacted. The Appellants also compare disparities in the Electoral College with those in the new law. What appellants do not point out is the following: That the allocation of unit votes in 1917 to the population from the last previous census gave counties having then 50.5% of the state's population 44.8% of the unit votes (Attachment A of complainant's Exhibit 8). Moreover, Attachment E of complainant's Exhibit 12 shows a comparison of disparity ratio in the distribution of the U. S. Electoral College votes and the Georgia county units under the 1917 Act and the 1962 Amendment. That attachment demonstrates that in no state in the electoral college were voters accorded less than .86% of an equal vote and that while 62% of the state's population had an electoral allocation within 15% of parity, only 23.2% of the counties of Georgia under the 1962 amendment have a unit allocation within that percentage of parity.

of one unit for 14,999 persons; and thereafter increments came in brackets of two units for 29,999 persons. Under this new device, no counties above 60,000 population could receive any increment of unit votes for less than 30,000 increments of population.

Throughout the State, units were assigned in a "crazy-quilt" pattern creating grave and absolutely senseless disparities amongst counties in the same geographic areas. Here are but a few examples: In the Sixth Congressional District, Crawford County, adjoining Bibb, has a unit per each 2,900 people; Bibb one unit per 11,000 population. In the Eighth Congressional District, Echols County, adjoining Lowndes, has one unit per 900 persons; Lowndes, one unit per 8,000 people. In the Fifth Congressional District, Rockdale County, adjoining DeKalb, has one unit per 5,250 people; DeKalb one unit for each 12,850 people. In the Tenth Congressional District, Oconee County, adjoining Clark, has one unit per 2,100 people; Clark one unit per 7,500 persons.

At the top of the population scale, a population increase of 30,000 will entitle a county to two additional units; at the bottom of the scale, the same population receives four units. Moreover, at the top, a 29,000 population increase receives no increments; at the bottom, 29,000 population entitles a county to four units.

During the trial, counsel for the Appellants was asked by the court for the rationale of the brackets under the new Act. No explanation was forthcoming except the general observation that the Legislature had seen fit to pass the Act.[3] (The record below contains no evidence

---

[3] Judge Hooper, in an exchange with counsel for the Appellants, said, amongst other things: ". . . Now I'm asking you what was the purpose of making it all the way through less units per thousand as the counties got larger, rather than making it the same unit per

from the Appellants showing any rationality or equity in the new county unit arrangement). The Appellants' evidence consisted in its entirety of the cross-examination of the Appellee, Sanders, an exhibit showing the consolidated election returns of Georgia's 1960 general election by counties and a table showing the population of each of Georgia's counties. Thus, the Appellants' evidence contained not one word showing that there is any equity in the system. In fact, Appellants' entire case was predicated on legal arguments relating to justiciability and jurisdiction.

Fulton County voters under this new Act were accorded but .52% of an equal vote but Echols voters were given 7.69 times an equal vote. Through the state, the advantages and disparities fell, not in any geographic location, but haphazardly. Rural people in Fulton County (which ranks third in rural population amongst the 159 counties of the State) suffered the same discrimination as the urban people in Fulton. Bankers in Twiggs were advantaged in the same way as the tenant farmers living there. The basis, if any, of the classification was not geographic but by population, the more the people, the less the vote of each.

This voting contrivance was superimposed upon a state having a House of Representatives of which a majority can currently be elected by voters in counties containing 22.2% of the state's population and a majority of whose Senate **was** in 1960 elected by voters in 28 of the 159 counties comprising but 5.5% of the state's population.

The new Act provided that to win the "first primary", a candidate had to receive a majority of the unit votes

---

thousand? What was the purpose behind that?" Mr. Murphy, counsel for Appellants, replied: "Well, I don't know. The Legislature passed this bill. We have to take it, whether or not it's valid and understandable, by what it says."

and a majority of the popular votes. But if one candidate obtained a clear majority of the popular vote, he was required to run in a second primary with a candidate having a minority of the popular votes, if the latter had obtained a majority of the unit votes. This conclusive primary was to be conducted between the popular vote candidate and the unit vote candidate but with the results strictly determined by the unit vote rule. As explained by the Floor Leader of the House of Representatives, this feature of the Act would assure that no candidate could succeed to a statewide office who had not first obtained a majority of the unit vote.[4]

Though the Act invalidated was enacted during the trial of the case, this had been anticipated and Appellee had filed, before trial, Professor Gaylord's affidavits containing the mathematical and statistical material in this record relating to this **new statute.** Moreover, other affidavits had been prepared and filed in advance of the trial, including that of Professor Bonner, showing the history of the unit system and its relation to rural antagonism to urban centers and to negro disfranchisement;[5] that of Mayor Emeritus Hartsfield, demonstrating

---

[4] The Hartsfield affidavit shows that under the Unit Rule urban citizens have not offered for and have not generally been electable to statewide office. This state of affairs would not logically be changed by the additional contrivance of a second conclusive county unit primary. If for no other reason, the panel court's decision is not premature if it opens the opportunities for all citizens to aspire and qualify for office and for all to vote equally in *all* primaries. The Appellants seem to contend that a primary is afforded constitutional protection if an *inconclusive* phase of it is conducted so that popular will is not totally disregarded.

[5] The County Unit System has a racial bite implicit from Professor Bonner's affidavit and from complainant's Exhibit 15 below showing white and negro registration by counties in 1958. The point is simply this: With some exceptions, negro registration is low where the unit system accords disproportionate voting power; negro registration is higher in population centers where both the white and negro vote counts less.

the depressing effect of the system on citizenship participation in urban centers and the baleful results of traditional statewide campaigns conducted with scorn and villification against urban populations; and the Hammer affidavit showing (inter alia) that where the median educational level in the state is the least, there is to be found the greatest county unit voting power and where that level is highest, the political power is the lowest.

When the court convened on April 27, it could not have failed to notice judicially the activities of the General Assembly convened by proclamation of the Governor on April 10, 1962. He called the session to "preserve, protect and defend the traditional democratic institutions **existing** in this state." (Emphasis ours.)

From April 16 to April 27, the General Assembly played out its role in public view. The Governor's call also provided for legislative reapportionment. This was totally abandoned. Original proposals for very limited "equal proportions" county unit allocation were dropped. The units of the smaller counties were sacrosanct. They were not subject to any revision downward.[6]

As Appellants contend, the opinion of the Court was pronounced on April 28. But as was twice announced by the Court in public, its opinion was not written under the circumstances implied in paragraph 5 of Appellants' Motion to Advance. At the commencement of the hearing on April 27, the Court announced that it had written seventeen pages of historical background to an eventual opinion which was to be considered and arrived at after

---

[6] Though efforts to repeal or to revise the unit system proportionate to population have been to no avail, twice when the legislature by a two-thirds majority in each house submitted a constitutional amendment extending the unit system, these proposals were defeated by substantial statewide popular majorities in 1950 and 1952 (See complainant's Exhibit 9).

trial and argument. The Court made it clear that the history which had been written up was not conclusive towards any result of the case.[7]

---

[7] Chief Judge Tuttle said of this history: ". . . In doing this, the three members of the Court unanimously feel that we have not included anything in this preliminary statement that is in any way—what's the word?" Judge Bell: "Have any effect on the case's ultimate decision."

ARGUMENT.

This Court clearly has jurisdiction of this cause; the questions presented are quite important. Why then does the Appellee ask that the case be disposed of on this Motion to Affirm?

There are two reasons:

1. There have never been any substantial questions in any county unit case except the issues of jurisdiction and justiciability (and until settled sixteen years ago, the constitutional protection afforded the Georgia Democratic Primary).

Since **Baker v. Carr** and **Scholle v. Hare**, a county unit case requires only the application of traditional standards established under the Equal Protection Clause and the clear language of the Seventeenth Amendment. In **Baker v. Carr**, this Court said:

> "Judicial standards under the Equal Protection Clause are well-developed and familiar, and it has been open to Courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects **no** policy, but simply arbitrary and capricious action."

Moreover, the Equal Protection Clause applied to a franchise case such as this does not involve those complications which may be present in a representation case. Except in a Swiss canton or a New England town meeting where every man represents himself, a citizen is **represented** by delegates chosen by himself and others. The citizens of the district represented all **share** the representation. They must; there is no other way.

Voting, however, is a personal right and normally exercised in a closed booth. One does not normally share

a voting right and no weighting is necessary nor is it usual. In representation cases, mathematical equality is not possible. In voting cases, it is not only possible but usual. Inasmuch as legislative representatives are necessarily shared by groups, classification by territory or population in this field is natural and necessary. This is not true, however, of legislation dealing with the individual right of franchise.[8]

The county unit system has been considered on its merits by two justices of this Court.[9] Mr. Justice Douglas

---

[8] Before the Panel Court, the Appellee argued that in a *voting* or franchise case, as contrasted with a *representation* case, no classification is permissible under the Equal Protection Clause, by which the vote of one qualified voter is diluted, distorted, and in many instances, reversed. Appellee does not abandon this position. However, he does not, at this stage, press this contention for this reason: While the Panel Court did not rule that a county unit voting tabulation was invidious discrimination per se, it applied a test to any such system which requires a degree of proportion to population or voters. Under this standard there is no substantial advantage to the use of the system by those who have profited from it in the past. In fact, a proportionate unit system deprives these groups of the right available under popular voting to join rural-minded city voters with others of like views in rural areas. Under a unit rule, the weight of such urban residents increase the unit votes which would be cast in a bloc as the pluralities in urban counties voted. Every indication since the order of April 28 leads to the conclusion that the vote tabulation on September 12 will be under a popular statewide majority rule. If this occurs, the issue of whether the county unit statute per se violates the Equal Protection Clause would be moot for this primary.

[9] The Georgia County Unit Cases have produced four opinions on the "merits". One, quoted from in this motion is the dissent of Mr. Justice Douglas joined by Mr. Justice Black in *South v. Peters*, 339 U. S. 276. Below in that case, 89 F. Supp. 672, Judge Andrews had also written a dissent which found the statute unconstitutional. All other opinions on the "merits" referred to by Appellants were written by Judge Sibley, who, in each instance, held the Court without jurisdiction and the issue a political question. The only opinion on the Georgia county unit system by judges or justices who believed the issues presented to be justiciable, have ruled the statute invalid on the merits. It is interesting to note that in 1938 the Supreme Court of Tennessee which took jurisdiction of a case involving its county unit statute, ruled it unconstitutional. See *Gates v. Long*, 113 S. W. 2d 388.

joined by Mr. Justice Black, dissenting in **South v. Peters**, 339 U. S. 276, stated the following:

> "Under both amendments [Fourteenth and Fifteenth] discriminations based on race, creed or color fall beyond the pale. Yet there is evidence in this case showing that Georgia's county unit system of consolidating votes in primary elections makes an equally invidious discrimination . . . The discrimination against citizens in the more populous counties of Georgia is plain. The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a Democratic system of government."

In this same opinion the two justices said:

> "The county unit system has other constitutional infirmities. Article I, Section 2 of the Constitution provides that members of the House of Representatives shall be 'chosen' by the people and the Seventeenth Amendment provides that senators shall be 'elected' by the people. These constitutional rights extend to the primary where that election is an integral part of the procedure of choosing Representatives or Senators or where, in fact, primaries effectively control the choice . . . ."

And finally:

> "Indeed, the only tenable premise under the Fourteenth, Fifteenth and Seventeenth Amendments is that where nominations are made in primary elections there shall be no inequality in voting power by reason of race, creed, or color, or other invidious discriminations."

Under the Seventeenth Amendment, the right to vote for U. S. Senator is derived from the United States Con-

stitution. The amendment not only requires that the Senators shall be "elected by the people" of the states but spells out who those people shall be:

> "The electors in each state shall have the qualifications requisite for electors of the most numerous branch of state legislatures."

Said electors in Georgia are defined in the State Constitution at Article II; Paragraph 2, and there defined not as county units but as:

> "Every citizen of this state who is a citizen of the United States, eighteen years or upwards, not laboring under any disabilities named in this article, and possessing the qualifications provided by it . . ."

Appellee contends that the state, having classified amongst its citizens those who are electors and entitled to vote in its elections, cannot thereafter discriminate within the class of persons it has established under the Fourteenth Amendment and cannot, under the Seventeenth Amendment, provide for the elections of senators by a contrived device by which the vote of the people is not only distorted and diluted, but frequently reversed.

2. Every consideration under the rubric of equitable discretion combines to urge the affirmance of the judgment below.

As the majority decision of this Court pointed out in **Baker v. Carr**, the doctrine of equitable discretion had played a decisive role in the result of **Colegrove v. Green**, 328 U. S. 549, and **MacDougall v. Green**, 335 U. S. 281, and perhaps in **South v. Peters**, 339 U. S. 276. In **Colegrove**, Mr. Justice Rutledge, whose vote was decisive, had stated:

> "The shortness of time remaining (before the election) makes its doubtful whether action could, or

would, be taken in time to secure for petitioners the effective relief they seek."

In **MacDougall**, Mr. Justice Rutledge had stated:

"We are on the eve of the national election. But twelve days remain. . . . Issuance of the injunction sought would invalidate the ballots already prepared, including the absentee ballots, and those now in the course of preparation."

In the case at bar the injunction has issued. The Appellants sought and were denied on May 4 a stay of the order. At that hearing on the requested stay Appellee brought to the Court's attention the general acceptance of a popular vote primary by voters and candidates alike. It was pointed out to the Court that candidates had entered races—attracted since the Court's decision on April 28 to a primary with an equitable voting structure. Three Congressional District Democratic Committees which had previously conducted primaries under the unit rule have, since the decision of April 28, voluntarily abandoned it.

The appellants have not asked this Court for a stay of the injunction entered below nor for reversal of the order refusing the stay. The Georgia political process is thus moving smoothly and inexorably towards a primary to be conducted on an equitable basis on September 12, 1962. An affirmance by this Court of the panel court's judgment will insure the expected and smooth course of events. Any other disposition given of the case will create uncertainty and confusion where none exists.

This Court, in **Baker v. Carr** and **Scholle v. Hare**, has ordered the lower judiciary to apply traditional Equal Protection standards to cases which the courts had frequently ruled barred from a judicial determination.

This panel court, composed of one District and two Circuit Judges, has applied the test, and the result the Court

reached is consonant with the principles of justice and equity. The worst that can happen in Georgia as a result of affirmance of the panel court's decision is that every Georgian gets one vote on September 12, 1962. This has not created any grave disturbance anywhere else and it will not in Georgia.

Wherefore, Appellee prays that the judgment of the panel court be affirmed.

Respectfully submitted,

HERMAN HEYMAN,

MORRIS B. ABRAM,

ROBERT E. HICKS,
Attorneys for Appellee.

1504 Healey Building,
Atlanta 3, Georgia.

APPENDIX.

The Court may judicially note as current history the following:

Congressman John W. Davis of the Seventh Georgia Congressional District summed up reaction to the change by his District Committee to the popular vote: "I didn't get a single bad letter about it."

Lieutenant Governor Garland Byrd, a candidate for Governor, called a popular vote "inevitable . . . according to the guidelines laid down by the Federal Court."

Senator Talmadge on qualifying for re-election, prior to the court's ruling of April 28, said that he was "perfectly willing" to run on either a popular vote or a unit vote basis.

Appellant Gray, the Democratic Party Chairman, while predicting the affirmance of the panel court's decision of April 28, stated that he thought a popular vote would "very definitely . . . be the logical way to handle" the primary.

Voting registration has soared in Fulton County since this case was filed and especially since the judgment was entered.